IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

Govind Narayan vs. Kumari Padma & another.

S.B.Civil Second Appeal No.144/1983 against the judgment and decree dated 10.3.1983 passed by Additional District Judge No.2, Udaipur in Civil appeal No.60/1982.

Date of Judgment: January 19,2006.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr.O.P. Pungalia,for the appellants.
No body appears on behalf of the respondent.

BY THE COURT:

Brief facts of the case are that the plaintiff Miss Padma, daughter of one Babulal, filed the suit for possession of the shop in dispute through her guardian Birdi Chand on 12.11.1868. As per the plaintiff's case, shop in dispute was taken on rent by plaintiff-Padma,s father Babulal, which was situated in the Taparia Building at Jalori Gate, Jodhpur and was having number GF-13. The rent of the suit premises was Rs.12/- per month. One Badri Das Pungalia used to recover the rent of the suit shop and vide bill no.9097 dated 12.5.1968, rent upto *Baishakh sudi-15,i.e. u*pto 12.5.1968 was demanded and it was paid to said Badri Das Pungalia for which issued receipt no.2500 dated

20.5.1968. The plaintiff's father Babulal expired on 30.5.1968. According to the plaintiff, till the death of said Babu Lal, the suit shop was in possession of the deceased Babu Lal and, thereafter, the plaintiff became the owner of the articles lying in the suit shop and the tenancy also devolved upon her. After the death of plaintiff's father, she was living in the guardianship of her maternal grand father. Therefore, the plaintiff's maternal grand father went to pay rent of shop to defendant no.1(date not given) then defendant no.1 told that the possession of the suit shop was taken over by defendant no.1-Govind Narayan. In this way, the plaintiff and her guardian came to know about the illegal taking over the possession of the suit shop by the defendant no.1. The plaintiff served upon a notice through her advocate upon the defendants on 23.9.1968 but despite this notice, the possession of the suit shop was not delivered to the plaintiff, therefore, the plaintiff filed the suit for possession of the suit shop.

The defendants submitted written statement and admitted that the suit shop is of the defendants and it was let out to deceased Babu Lal in the *Samvat* Year 2024, for which a rent deed was executed in favour of late Jai Narayan Taparia, who was grand-father of the defendants. The measurement of the shop in dispute is 4'x4'x3' only and it is stated that premises was so small that without help of a projection

extending the said shop, no business could have been done in the rented premises. It is stated that at the time of giving the suit shop on rent, a wooden plank was fixed to extend the shop. The plaintiff's case is that wooden plank was of the plaintiff's father whereas defendants stated that it was of the defendants. It is admitted that Badri Das Pungalia used to collect the rent of the shop from the tenants of the building including from deceased Babu Lal. According to the defendants, deceased Babu Lal was sick since last long period and the sickness of Babu Lal was increasing and he became very weak. There was no body to look after the business of the tenant Babulal whatever small it may be. Therefore, he asked the defendants to give the bill of the rent for the month ending *Baishakh sudi-15, 2024* so that he may pay the rent and vacate the suit premises. Thereafter, in fact the bill was given to said Babu Lal and he paid the rent and surrendered the possession of the suit shop. Since the suit shop was not opened for some time before it was vacated by the tenant which is evident from the fact that the electricity was not consumed by the tenant Babu Lal for this period. The defendants admitted bill dated 12.5.1968 and the receipt dated 20.5.1968. It is stated that in view of the above facts, the plaintiff's suit deserves to be dismissed as tenant himself surrendered the tenancy and delivered the possession of the shop to the landlord in the life time.

The trial court framed as many as nine issues which are about whether the plaintiff is daughter of deceased Babu Lal and Birdi Chand is the next friend of the plaintiff and has right to file suit on behalf of the plaintiff, whether the wooden plank which was fixed in front of the shop, was in the ownership of Babu Lal, whether the suit shop was in possession of Babu Lal till his death and his goods were lying in the shops even after his death, whether the defendants forcibly took possession of the suit shop and the plaintiff is entitled to Rs.300/- as cost of the articles of deceased Babu Lal and also entitled to take possession of the suit shop from the defendants. On the plea taken by the defendants, the trial court also framed issue whether the court fee is insufficient and whether the suit has been filed without seeking permission of the court by the next friend and the suit is defective because of misjoinder of the causes of action and whether Smt. Ramkanwari and Smt. Yamuna Maloo are necessary parties in the suit.

The trial court held that the suit was competent as it has been filed by the next friend of the plaintiff and also held that the plaintiff is daughter of deceased Babu Lal. The trial court held that deceased Babu Lal was the tenant in the suit shop and he did not vacate the suit shop before his death. The rent was paid upto 20.5.1968 and the evidence of the defendants' witness particularly of Chetan Das cannot

be relied upon and the defendants illegally took possession of the suit shop, however, the trial court held that the wooden plank fixed in front of the shop was not of Babu Lal but it was of the defendants. The trial court also held that the plaintiff failed to prove that any goods of Babu Lal were lying in the suit shop, therefore, the plaintiff is not entitled to decree for the said amount of cost of goods from the defendants. The issue of court fee was decided against the defendants. During the pendency of the suit, the next friend Birdi Chand died and the trial court held that, the suit still maintainable because Kedar Das was appointed as next friend of plaintiff-Padma. The plea of misjoinder of causes of action was rejected by the trial court. The trial court ultimately decreed the suit of the plaintiff for possession against the defendants by judgment and decree dated 12.7.1979. Against this judgment and decree dated 12.7.1979, the defendants preferred regular first appeal which was dismissed by the first appellate court by judgment and decree dated 10.3.1983. Hence this second appeal.

Following substantial question of law were framed while admitting the appeal on 24.10.1083:-

> *"Whether the finding of the courts below are vitiated on account of mis-reading of evidence and ignoring material evidence."*

It has been submitted by the learned counsel for the appellants

that the courts below committed serious error of law in relying upon the statements of PW-1 and PW-2 who are highly interested witnesses. It is also submitted that the courts below committed serious error of law in not relying upon the fact that the escheated proceedings were initiated and in the proceedings, admittedly there was no reference of the shop in dispute and the shop in dispute was not included in the escheated proceedings by the plaintiffs guardian who is not only closest relative and guardian but he used to visit the shop regularly in the life time of deceased tenant. It is also submitted that the two courts below failed to consider the material evidence available on record, apart from the fact that even if all the evidence produced by the plaintiff is accepted then by that evidence it is not proved that the possession of the suit shop was taken by the defendants illegally, as there is no evidence, direct or circumstantial, to show that deceased Babu Lal was in possession of the suit shop at the time of his death.

The learned counsel for the appellants vehemently submitted that both the courts below failed to read the evidence of plaintiff's own witness PW-1 wherein said witness clearly admitted the case of the defendants. The defendants' case is that deceased Babu Lal remained in occupation of the suit shop as tenant till *Baishak Sudi-15*. He died in the month of *Jeth Sudi-3*. The defendants also stated that the said witness

Birdi Chand was highly interested witness and went to the extent of initiating the escheated proceedings for the properties of the deceased Babu Lal and this fact has been admitted by PW-1 Birdi Chand in his statement. He also got the house attached in the escheated proceedings by affixture of seal over the house despite the fact that said Birdi Chand admitted in his statement that deceased Babu Lal's cousins were in occupation of the house. It is also stated by the learned counsel for the appellants that the witness Kedar Das cannot be relied upon. He in his examination-in-chief clearly stated that he went to Laxmi Narayan and offered the rent and he was told that the possession of the shop has been taken over by the defendants whereas in cross-examination he admitted that he is not even knowing whether Laxmi Narain was alive or not. He further admitted that he was not even knowing Laxmi Narain. The witnesses Birdi Chand and Kedar Das both had full knowledge that Miss Padma is living with heir of deceased Babu Lal then they could not have moved an application for initiation of escheated proceedings but they did so because of obvious reason to oust the relatives of deceased Babu Lal only. The learned counsel for the appellants also submitted that the courts below committed serious error of law in drawing adverse inference against the plaintiff and in not drawing same inference for non-production of accounts books of deceased Babu Lal who was maintaining the account-books and both the witnesses were in

possession of all relevant documents.The fact that Kedar Das in his statement clearly stated that he got the bill Ex.2 and receipt Ex.3 from the documents of Babu Lal and also admitted that they were in possession of the account-books including *Rokad and Khata-bahi* and further admitted that Babu Lal was keeping the accounts of the business of the shop. In nut-shell, the learned counsel for the appellants' submission is that there is no evidence that deceased Babu Lal was in possession of the suit shop after the month of *Baishak* of the relevant year. It is also submitted by the learned counsel for the appellants that the courts below committed serious error of law and in fact though the issues were framed putting burden upon the plaintiff but from the judgments of both the courts below it appears that both the courts below were under impression that it is the duty of the defendants to prove that defendants took possession from Babu Lal on a particular date.

I considered the submissions of the learned counsel for the appellants, as no body appeared on behalf of the respondent despite service and perused the record also.

It is apparent from the reasons given by the two courts below that the two courts below held that Babu Lal was tenant in the suit shop. For this there is no dispute. Ex.2 was issued on behalf of the landlord is also not in dispute and the rent of the suit shop was paid by receipt Ex.3

dated 20.5.1968. For this, the plaintiff produced PW-1 Birdi Chand and PW-2 Kedar Das and PW-3 Gopal Raj and also produced documentary evidence. The bill demanding the rent is dated 12.5.1968(Ex.2) and the receipt issued for the rent is dated 20.5.1968(Ex.3) and the copy of the notice served upon the defendants through her advocate is Ex.1. Since Ex.1 to Ex.3 are admitted documents, the effect of these documents Ex.2 and 3 is only to the effect that Babu Lal was tenant and bill was demanded from him, as last upto 12.5.1968 and was paid lastly by 20.5.1968.

From not only from the evidence of plaintiff but from admission of the defendants it is proved, rather say is an admitted fact that Babu Lal was tenant in the shop in dispute. The crucial question in the facts was whether the landlords illegally took possession of shop after the death of said Babu Lal ? It is clear from the case of the plaintiff that the plaintiff herself, who was minor at the time of filing the suit and she had no personal knowledge of all facts. She did not appear in the witness box since she had no personal knowledge of the fact and she was minor, therefore, her non-appearance in the witness-box cannot adversely affect the merit of the case of the plaintiff. The person who instituted the suit on behalf of the plaintiff, namely, Birdi Chand, who is maternal grand-father of the plaintiff. It is clear from the statement of said witness PW-1 Birdi Chand that he is very much interested in the

interest of the plaintiff. This interest is natural as the deceased Babu Lal was his son-in-law and the plaintiff is his sister's daughter. The interest of PW-1 Birdi Chand further increased because of the reason that there was no body to look after plaintiff Padma except him. The trial court as well as the first appellate court relied upon the evidence of PW-1 Birdi Chand as he stated that till the time of death, Babu Lal was in possession of the suit shop and the defendants illegally took possession of the suit shop after death of Babu Lal. What two courts below missed is that in the plaint and in the statements of the witnesses as well as in the notice of the plaintiff dated 20.9.1968, the date or even month in which the possession was taken over by the defendants, has not been given out. Be it as it may be, the plaintiff's guardian first action against the illegal act of the defendants is by serving notice which is dated 20.9.1968 which is after almost four months from the date of death of Babu Lal. The two courts below did not consider this aspect of the matter particularly in view of the fact that according to the plaintiff's own witnesses, for the properties of deceased Babu Lal, some dispute arose immediately after the death of Babu Lal. According to plaintiff's two most important witnesses themselves, the escheated proceedings were initiated within a few days after the death of Babu Lal and even house of Babu Lal was got attached in the escheated proceedings. It may be possible that in some cases, no

steps are taken to take care of the properties of the deceased for a long period but when dispute starts immediately after the death of a person for the properties of the deceased then every body would like to take care of the properties and will try to safeguard or grab the properties of the deceased in normal behaviour of human. PW-1 and PW-2 both clearly stated on oath that they were in regular touch of deceased Babu Lal till his death and this was very natural looking to the relation of the witnesses with deceased Babu Lal till his death. They were even visiting the shop of deceased Babu Lal and according to them, till Babu Lal died. It is strange that to protect the property of Babu Lal if these persons could have initiated proceedings for the house of Babu Lal then they could have well included the shop in dispute also in the escheated proceedings but, admittedly, the shop in dispute was not included by them in the escheated proceedings. PW-1 clearly admitted that he did not disclose the shop in dispute to be of Babu Lal in the escheated proceedings before the Tehsildar. The two courts below also failed to appreciate that PW-2 Kedar Das who is maternal uncle of the plaintiff, stated on oath that he went to offer the rent to Laxmi Narain but in fact Laxmi Narain had already died long ago. PW-2 categorically stated that Laxmi Narain told that possession of the suit shop has been delivered to them by Babu Lal. By this statement, at least it has been admitted that to whom the rent was offered by him, he told Kedar Das that Babu Lal

has delivered the possession of the suit shop. This event happened obviously after the end of the month of the tenancy of *Baishak Sudi-15*. Therefore, Kedar Das must have got the knowledge that the possession of the suit shop has been taken over by the defendants but still neither F.I.R. was lodged nor notice was served immediately by these persons on behalf of the plaintiff and there is no explanation for not doing so. If the possession of shop was taken in illegal manner by the landlords, there could not have been any sympathy for them and in this case sympathy of even a distant relation of plaintiff would have prompted him to take action immediately but in this case even it has not been disclosed when the plaintiff's maternal grand-father who filed the suit on behalf of plaintiff went to landlords and offered the rent. In absence of it, the giving of notice on behalf of plaintiff to landlords after few months casts serious doubt over the case of the plaintiff.

Apart from above, Kedar Das, after admitting that Babu Lal was keeping all the account-books like *Rokad and khata-bahi*, no documentary evidence has been produced by them to show that Babu Lal was doing the business in the suit shop few months before his death and therefore there was no reason for Babu Lal to surrender the tenancy. Admittedly, Babu Lal was so sick that he was not in position to do the business and if this fact is considered along with other facts and circumstances, the cumulative effect casts a serious doubt over the case

of the plaintiff that possession of the deceased Babu Lal's shop was illegally taken by the defendants.

At this juncture, it will be worthwhile to consider the evidence of Shri Gopal Raj. The witness Shri Gopal Raj clearly stated that his relationship with Babu Lal was from the time of his father and Shri Gopal Raj was called upon by Babu Lal for preparing a Will. This fact cannot be disputed but the question arises is that whether Babu Lal was in occupation of the suit shop till he died, for which the relevant factor is the time on which Babu Lal called learned Advocate to prepare the Will. In cross-examination, said witness clearly admitted that he cannot give exact date. Since there is difference of few days only in claim of handing over possession of the suit shop to the landlord and tenant's death, therefore, merely on the basis of statement without specific date or month , it cannot be held that Babu Lal could not have delivered the possession of the suit shop to the defendants particularly in view of the fact that there is no other reliable evidence in support of continuation of the tenancy of Babu Lal after *Baishak Sudi-15*. It appears from the reason given by the two courts below while considering the evidence of the witnesses that the two courts below accepted whatever stated by the witnesses of the plaintiff as true without reading the evidence in complete and finding out the truth from the evidence of the witnesses and without examining the preponderance of probabilities from the

evidence. When there is no direct evidence of taking over possession by the defendants illegally and when there is no immediate action by the guardian of the plaintiff inspite of the fact that he tried to protect the other properties of the deceased by initiating the escheated proceedings, then their conduct of not taking any action for alleged illegal action of the defendants, was the crucial point and after taking note of this fact, the trial court should have examined the credibility of the witnesses which has not been done by the two courts below. The two courts below further failed to consider that the plaintiff could have produced independent witness but not a single witness was produced.

Not only this but the finding recorded by the two courts below are self-contradictory inasmuch as both the two courts below concurrently held that the plaintiff failed to prove that any articles were lying in the suit shop and were taken over by the defendants, then how a finding of possession of Babu Lal could have been given? The two courts below also failed to appreciate this important relevant material fact that the suit property was so small that without addition of the area by affixing a wooden plank, no business could have been carried out, then in such situation, can the plea of the defendants that because of the long sickness of Babu Lal, he surrendered his tenancy, is so improbable so as to believe it.

In view of the above, the appellants succeeds in proving that the finding recorded by the two courts below is vitiated on account of misreading of the evidence and because of ignoring material evidence. Hence, the appeal of the appellants is allowed and the judgments and decrees passed by the trial court dated 12.7.1979 and the first appellate court dated 10.3.1983 are set aside. The suit of the plaintiff is dismissed. No order as to costs.

(PRAKASH TATIA),J.

mlt.